BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 35527-s41H BY GLENN H. AND LYLA E. LEHRER	))))	FINAL ORDER

* * * * * * * * * *

The time period for filing exceptions to the Proposal for Decision of April 4, 1984 has expired and exceptions have been received from both parties. For the reasons stated below, and after having given the objections full consideration, the Department of Natural Resources and Conservation (hereafter, "Department") accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in her Proposal for Decision, April 4, 1984, and expressly incorporates them herein by reference.

A. Department Response to Objections

1. Mr. Lehrer

Mr. Lehrer filed a letter taking exception to the Proposal's discussion of the legal issues involved in a determination of "beneficial use" for the purposes of prior appropriative doctrine. The discussion was intended to convey the conclusion that a private party cannot obtain an instream fish and wildlife use appropriation. This is the inescapable conclusion from a reading of the case law, and the past, as well as current,

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statutory provisions. Hence, the memorandum should have clarified that the appropriation described on p. 19, was limited to instream appropriations only.

Regarding private appropriations for fish and wildlife use where the appropriator constructs a diversion or impoundment, the law is decidedly less clear. No Montana case or statute states that such an appropriation is contemplated. On the other hand, the Water Use Act could be interpreted to allow this use to be permitted, and no case or statute definitely prohibits it. Having been authorized to proceed with his requested appropriation, this Applicant is not adversely affected by the Proposal. The Proposal did not, as Mr. Lehrer alleges, hold that his use for fish and wildlife was not beneficial, but rather raised the issue without so deciding. Whether a private appropriator may appropriate water for fish and wildlife use, other than for commercial uses, is indeed a complex legal issue which cannot adequately be addressed by a person's mere assertion of "benefit". The Department did not rule that the pond would not improve the aesthetics of the area, nor that the Applicant and neighbors would not "benefit", in the lay sense, from the pond. Mr. Lehrer's remaining comments need not be addressed because of the disposition of the matter herein.

2. Mr. and Mrs. Westlake

A review of the complete record indicates that the Findings of Fact were based on competent substantial evidence and the proceedings complied with essential requirements of law. § 2-4-621(3) MCA (1983).

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The Westlakes allege that there is no surplus water available for the appropriation. The appropriation is largely non-consumptive, however, and, the evidence does demonstrate that at least some years there is water available for appropriation. See, Proposal.

Because of the substantially non-consumptive nature of Applicant's project, the allegation that the Permit issuance would cause the stream to dry up earlier is not supported by the evidence. Further, the evidence indicated that because of the existence of standing water in the area, the proposed pond would not increase evaporative or absorption losses.

The evidence supports the Findings of Fact to the effect that no adverse affect will result to the Westlakes. Without deciding whether an increase in pumping costs is adverse affect within the meaning of the applicable law, the Department rejects the assertion that such affects will occur.

The Westlakes further state that the natural state of the area allows for livestock watering, and that therefore the Permit need not issue. The mere existence of alternative means of appropriating water does not necessitate the denial of the Permit. An appropriator may not be forced to utilize the most efficient means, only a reasonable one. State ex rel. Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939), Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939).

Lastly, while it is true that no exactive testing has been carried out, the only perfect test is for the Applicant to construct his appropriation works.

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The evidence on the record indicates that in short order, the pond simply will fill up with water, and spill the rest downstream, having virtually no effect on Deer Creek. (Testing of Jan Mack, Glen Lehrer). As with all Provisional Permits, the Permit is subject to all prior existing rights, and if the Department, upon investigation and complaint, finds the Applicant to be adversely affecting the Objectors' rights, the Permit will be modified or revoked accordingly. MCA § 85-2-314.

THEREFORE, based on the record and the proceedings herein, the Department hereby makes the following:

ORDER

1. Subject to the terms and restrictions listed below, Application for Beneficial Water Use Permit No. 35527-s41H is granted to Glenn H. and Lyla E. Lehrer to construct an impoundment of water to hold up to between .156 and .196 ac-ft of water, and to be approximately 39' X 55' with a maximum depth of 8 feet located on Lot 52, Grandview I Subdivision, in the SW¼NW¼NE¼ of Section 20, Township 1 South, Range 10 East, Gallatin County, Montana, for stockwatering purposes.

2. This Permit is subject to all prior and existing water rights in the source of supply.

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3. Nothing herein shall be construed in any way to effect or reduce the Permitee's liability for damages which may be caused by the exercise of this Provisional Permit, nor does the Department in issuing this Provisional Permit in any way acknowledge liablilty for any damages caused by the exercise of this Permit.

4. The Permittee shall in no event cause to be impounded or diverted from the source of supply pursuant to this Permit more water than is reasonably required for the purposes described herein. At all times when the water is not reasonably required for these purposes, the Permittee, shall cause and otherwise allow the waters to remain in the source of supply.

5. The Permittee, shall take whatever steps are reasonably necessary to correct any adverse affects to the Objector's water supply shown to result from appropriation under this Permit.

6. The Permittee shall diligently adhere to the terms and conditions of this Permit. Failure to adhere to the terms and conditions may result in a revocation or modification of the Permit.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

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DONE this 25th day of July, 1984.

Gary Fritz

Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 444 - 6605

Sarah A. Bond

Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

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AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on July 26, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Glenn and Lyla Lehrer, Application No. 35527-s41H, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Glenn & Lyla Lehrer, 8636 Panorama East, Bozeman, MT 59715
2. Leo & Audrey Westlake, 3820 McIlhattan Rd, Bozeman, MT 59715
3. H.A. Bolinger, P.O. Box 1047, Bozeman, MT 59715
4. Scott Compton, Water Rights Bureau Field Office (inter-departmental mail)
5. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 26 day of July, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Jim P. Gilman

Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-1987

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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 35527-s41H BY GLENN H. LEHRER)

* * * * * * * * * * *

Pursuant to the Montana Water Use Act, MCA Title 85, Chapter 2, and to the Montana Administrative Procedures Act, MCA Title 2, Chapter 4, Part 6, a hearing in the above entitled matter was held on October 5, 1983, in Bozeman, Montana.

I STATEMENT OF THE CASE

A. Parties:

Glenn H. Lehrer (The "Applicant") appeared pro se. The Montana Power Company, represented by Gough, Shanahan, Johnson and Waterman, through K. Paul Stahl, did not appear, but, by letter of February 26, 1982, (confirmed by telephone conversation between the Hearing Examiner and Mr. Stahl) acquiesced to the granting of the permit, while remaining a party hereto. Leo Eugene and Audrey E. Westlake, Objectors herein appeared personally and were represented by counsel, H. A. Bolinger. Jan Mack, Staff Expert, employed by the Department of Natural Resources and Conservation (hereafter, "Department") at the Bozeman Water Rights Bureau Field Office, also appeared at the hearing in his capacity as Staff Expert.

The record of the hearing closed at the conclusion of the hearing, pending submission of additional evidence within 10 days. No submission were received.

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B. Case:

The Applicant seeks to appropriate 30 gpm up to .186 ac-ft per year for a recreational use, ie: instream pond for stock and wildlife watering, and private recreational uses, located on Lot 52 in, Grandview I Subdivision, in the SW¼ NW¼ NE¼ of Section 20, Township 1 South, Range 6 East, Gallatin County, Montana. The claimed source of supply is various underdeveloped springs of an unnamed tributary of the East Gallatin River.

Mr. & Mrs. Westlake through their attorney, H.A. Bolinger, filed an objection to the granting of the application. The Westlakes alleged generally that Applicant's proposed pond would cause additional evaporation and seepage, and seriously interfere with their supply of stockwater for their 250 cattle and 10 horses. The Westlakes' stockwater rights are evidenced by a copy of; a) An acknowledgement of claim, Upper Missouri River Water Court Division, b) Statement of claim for Existing Water Rights Stockwater for the Water Courts of the State of Montana. The water right purports to include a priority date of January 16, 1890, for the use of 5000 gallons per day from Deer Creek (a/k/a Skully Gully), tributary of East Gallatin River, for the purpose of watering 250 cattle and 10 horses, from January 1, to December 31, inclusive.

C. Exhibits:

The Applicant offered into the record the following [illegible]

1. September 29, 1982, letter to Glenn H. Lehrer, from Ellen Woodbury, District Clerk, Gallatin Conservation District.

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The letter notifies Mr. Lehrer of the Board's approval of his 310 application (Natural Streambed and Land Preservation Act) for his dam.

2. A November, 1982, drawing by Mr. Gordon, U.S. Department of Agriculture, Soil Conservation Service, showing a plan view and cross section of Glenn H. Lehrer Stockwater and Recreation Pond. The pond's dimensions are shown estimated as: excavation; 162.00 cubic yards + corners; surface area, 2639 sq. ft. or .06 acres; storage area, .06 acres x.4x7 ft or .168 ac-ft.

3. A February, 1983, Resource Report Proposed Dugout for Glenn H. Lehrer, by Walter C. Anderson, District Conservationist, Soil Conservation Service. The report, on the proposed project of a pond approximately 39 feet wide by 55 feet in length with maximum depth of 8 feet, calculates surface evaporation at .14 ac-ft per year, states the probability that seepage loss would return to the same watershed as springs in the draw below the proposed site, and that in most any year the pond could be filled in hours from snow melt, after which water replacement for evaporation loss would be minimal.

Photographs, taken by Mr. Lehrer on May 1, 1983, labeled as follows:

4. Looking to west of proposed pond.

5. To east on fill above culvert.

6. To east.

7. Out fall to culvert in road fill.

8. Pond area to south from house.

9. Westlakes' property - to west.

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10. Letter of September 12, 1983, to Glenn H. Lehrer, from Stephan G. Custer, Phd., Hydrogeologist. The letter responds to Mr. Lehrer's request to assess the impact of developing a pond 10 feet deep and 60 feet in diameter. Based on his on site investigation and the available literature, Dr. Custer opines that the pond when excavated probably will not cause damage to the stream as long as water is allowed to flow through the pond and downstream.

All of the Applicant's exhibits were received into the record. Exhibit Number 10 was admitted not for the truth of the matter asserted therein, but for the sole purpose of showing whether Mr. Lehrer has proceeded with reasonable diligence in developing his appropriation.

The Objectors offered the following exhibits into the record:

1. A copy of an aerial photograph of Deer Creek (Skully Gully), including Lehrer's house and Westlakes' homestead. Depicted thereon were measurements of Deer Creek stream flow taken by the Westlakes.

Photographs, taken by Mr. Westlake on August 13, 1982, labeled as follows:

2. Deer Creek Crossing.

3. Subdivision fence.

4. Where road crosses Deer Creek in subdivision.

5. At barn or house (Deer Creek).

6. Below Lehrer's - creek runs through this.

All of the Objectors' exhibits were received into the record.

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The Department offered the following exhibits into the record:

1. A copy of part of an aerial photograph showing Mr. Lehrer's house, Deer Creek, and Mr. & Mrs. Westlakes' property.

2. Field report, October 5, 1983, by Jan R. Mack, New Appropriations Supervisor, Department of Natural Resources and Conservation.

Both of the Department's exhibits were received into the record.

The record closed 10 days after the hearing, on October 15, 1983, no supplementary exhibits having been received by either party.

II PRELIMINARY MATTERS

1.a. The Objector objected to the introduction into evidence of certain documents (Applicant's Exh. 3, 10) sponsored by the Applicant. The bases for the objection were that; a) the Applicant's failure to produce the authors of those documents prevented Objectors from cross-examining the documents, and b) the lack of notice to Objectors of the intention to introduce these documents, prevented Objectors from effectively preparing cross-examination thereof. The documents were received into evidence because of the informal nature of the hearing[1], and

[1] MCA § 85-2-121 (1983). Administrative Proceedings. The Montana Administrative Procedure Act governs administrative proceedings conducted under parts 1 through 4 of this chapter, except that the common law and statutory rules of evidence shall apply only upon stipulation of all parties to a proceeding. (emphasis added).

after a brief recess for the Objectors to review the documents, and to prepare their cross-examination. The first objection, that inability to cross-examine the declarant rendered the evidence incompetent hearsay, is overruled and hereby affirmed because the formal rules of evidence do not apply herein.[2] The second objection, that failure to produce the documents' author, and failure to provide a copy of the document, to the Objectors in advance, effectively precluded meaningful cross-examination thereof, is more serious, as the Objectors' right of cross-examination in this proceeding is not an evidentiary rule but rather is a constitutionally protected fundamental right specifically protected by statute. MCA § 2-4-612(5) (1983) provides, "A party shall have the right to conduct cross-examination required for a full and true disclosure of facts, including the right to cross-examine the author of any document prepared by or on behalf of or for the use of the agency and offered in evidence." see generally, Hert v. J.J. Newberry, 178 Mont. 355, 584 P.2d. 656, rehearing denied 587 P.2d. 11 (1980).

The receipt into the record of Applicant's Exhibits No. 3, and No. 10 was conditioned adequately to protect the objectors procedural rights. Exhibit No. 3 was prepared by a public agency, pursuant to its authority and duty to issue permits [illegible]

[2] The documents do appear to be hearsay, although because the Applicant appeared pro se, no legal argument was had on this point.

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the Natural Streambed and Preservation Act of 1975, MCA §§ 75-7-101-124 (1983). As a public document, prepared and maintained in the ordinary course of business, it commands greater respect than accorded hearsay documents. And, as a matter of public policy, the Department must respect various factual determinations made by sister agencies, in furtherance of their statutorily mandated duties. The objectors were given a recess to examine the document, thus mitigating the effects of unfair surprise.

Applicant's Exhibit No. 10 was prepared by a private consultant, for the agency's use in this hearing. Because the author was not present for cross-examination, this document was admitted for the limited purpose of showing Applicants' reasonable diligence in pursuing his application, or, more accurately, his present intent to appropriate, as of the time of his permit application.

The Applicant's request for continuance, granted by Order of November 1, 1982, called into issue whether the Applicant has proceeded with reasonable diligence in the development of his appropriation. See, Order of November 1, 1982. This is so, because an applicant cannot avail himnself of an earlier priority date than the time at which he intends to appropriate. That is, an applicant cannot file his application without present intent to appropriate and then, by successive requests for continuance, maintain that date for a development intended for subsequent use. Power v. Switzer, 21 Mont. 523, 55 P. 32 (1898), MCA § 85-2-310(3) (1983).

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b. Objectors also objected to the amendment, at the hearing, of the Applicant's Application for Beneficial Water Use Permit. The basis for this objection was basically one of unfair surprise, or lack of notice. This objection was overruled, and the Hearing Examiner hereby affirms this ruling. The Objectors did, in fact, have notice of the substance of the amendment. By letter of February 16, 1982, Jan Mack notified the Objectors that the Applicant had withdrawn the request for the irrigation use requested in the application. Mr. Westlake signed the certified letter receipt showing that he accepted delivery of the letter on February 17, 1982.

Because, fundamentally, due process requires public notice Mullane v. Central Hanover Trust 339 US 306(1950), Frates v. Great Falls 40 St. Rep. 1307 (1983), the Hearing Examiner has a duty to ensure adequacy of public notice given for all contested case hearings. In the Matter of the Application for Beneficial Water Use Permit No. 24591-g41H by Kenyon-Noble Ready Mix Co., Proposal for Decision, June 3rd, 1981, Final Order, July 18th, 1981. Pursuant to MCA § 85-2-307(1) (1983), public notice was published herein, encompassing an application similar in all pertinent respects, but of greater magnitude then that of the amended application. It follows, therefore, that the notice fully included within its scope the amended version, and that therefore, adequate public notice of the amended version was given. Further, no interested persons who would be affected by the amended version of the application would not be notified by the original public notice published in the newspapers. No

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material changes in the source, diversion, or use of water have occurred such as would require republication.

III PROPOSED FINDINGS OF FACTS

1. The Department has jurisdiction over the parties and the subject matter herein.

2. The instant application filed with the Department at 3 o'clock p.m. on July 22, 1981, was amended at the hearing.

3. The Application was published for three (3) successive weeks in the Bozeman Daily Chronicle, a newspaper of general circulation in the area of the source.

4. The source of supply for the appropriation applied for herein is three or four springs arising on the Applicant's land, and on land adjacent thereto, on Lot 52, of the Grandview I Subdivision, or the SW¼NW¼NE¼ of Section 20, T1S, R6E, Gallatin County, Montana.

5. Applicant intends to impound water by excavating a hole, approximately 8-10 feet deep and 39 feet long by 55 feet wide in the stream known as Deer Creek (a/k/a Skully Gully) as it crosses his property. The holding capacity of the pond thus created will be approximately .168 ac-ft. Spring water, once it has filled the pond, will continue down its natural channel.

6. The use proposed by the Applicant is substantially non-consumptive.

7. The uses proposed by the Applicant are for the benefit of the Applicant, ie: recreation use for private fishing, ice skating, and stockwatering for Applicant's two horses pastured on his property adjacent to Deer Creek.

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8. The method of use proposed by the Applicant is a reasonable means of affecting his proposed uses.

9. The impoundment of .168 ac-ft of water from the springs contributing to Deer Creek at the site proposed herein most probably will not result in increased evaporation loss to Deer Creek.

10. The area which the Applicant proposes to excavate is a marshy area, where standing water exists for much of the time in most years.

11. The source springs are recharged from underground water, probably originating as snowmelt in the Bridger Mountains.

12. Deer Creek is a small stream flowing first through Applicant's property, then through a portion of Objector's pasture. Its flow varies year to year and seasonally. Measured just downstream from Applicant's property, it flows at between 11 and 14 gpm (August, 1982). Further downstream, where it flows through Objector's pasture, it was measured at 40 gpm on August 13, 1982. (Objector's exhibit 1) Normally, in late July or August the stream dries up prior to reaching Objector's farmstead, downstream from Applicant's property and upstream, or northwest, from the East Gallatin River. The creek is a tributary to the East Gallatin River.

13. The Objectors claim an Existing Water Use Right for Stockwater from Deer Creek (Skully Gully) of 10 ac-ft per year, 5000 gallons per day, 40 gpm with a priority date of January 16, 1890. This claim is evidenced by a copy of acknowledgement of

claim, Upper Missouri River Basin Water Court Division, and a copy of Claim for Existing Water Rights (Stockwater) for the Water Courts of the State of Montana.

14. The Department received, on November 16, 1981, Mr. & Mrs. Westlakes' objection to the instant application. The objection was timely and determined to be valid.

15. In most years the Objectors require the full flow of Deer Creek to satisfy their water use right.

16. Applicants proposed use, being substantially non-consumptive, will not adversely affect the Objector's prior existing water rights.

17. The Applicant is willing to take remedial measures to reduce the impact on the flow of Deer Creek caused by seepage from his proposed pond.

IV PROPOSED CONCLUSIONS OF LAW

1. The Department has jurisdiction over the parties and the subject matter of this hearing.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled and, therefore, the matter was properly before the hearing examiner.

3. MCA § 85-2-311 directs the Department to issue a permit "if the Applicant proves by substantial credible evidence that the following criteria are met:

(a) there are unappropriated waters in the source of supply:

(i) at times when the water can be put to the use proposed by the applicant;

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(ii) in the amount the applicant seeks to appropriate; and

(iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;

(b) the rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. Because the Applicant has shown by substantial credible evidence that the proposed use is substantially non-consumptive, there are unappropriated waters in the source of supply; at times when the water can be put to the use proposed by the Applicant; in the amount the Applicant seeks to appropriate and throughout the period during which the Applicant seeks to appropriate, the amount requested is available. By the Objector's own measurements in August, 1982, the driest month of the summer, the creek flows at 11 gpm at the furthest measured point downstream. At that rate, the creek will supply 15,840 gallons per day.(In 1983, however, the creek was dry at this point.) Since their stockwater rights are for 8,000 gallons per day, at least in some years there is unappropriated water in the source of supply. See, Objector's Exhibit 1.

5. The Applicant proved by substantial credible evidence that the rights of the Objectors will not be adversely affected

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by the Applicant's proposed use, provided the permit, if issued, is conditioned to require the Applicant to take remedial measures should unforseen adverse affects on Deer Creek result from his appropriation.

6. The Applicant proved by substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

7. The stockwater use by Applicants is a beneficial use as a matter of law. MCA § 85-2-102(2) (1983).

8. The Applicant proved by substantial credible evidence that the proposed use will not interfere with other planned uses or developments already permitted or for which water has been reserved.

V PROPOSED ORDER

Based upon the foregoing Proposed Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

1. Subject to the terms and restrictions listed below, a provisional permit is granted to the Applicant to construct an impoundment of water to hold up to between .156 and .196 ac-ft of water, and to be approximately 39 X 55 with a maximum depth of [illegible] feet located on Lot 52, Grandview I Subdivision, in the SE¼ NE¼ of Section 20, Township 1 South, Range 10 East, Gallatin County, Montana, for stockwatering purposes.

2. This permit is subject to all prior and existing water rights in the source of supply.

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3. Nothing herein shall be construed in any way to effect or reduce the Permitee's liability for damages which may be caused by the exercise of this Provisional Permit, nor does the Department in issuing this Provisional Permit in any way acknowledge liablilty for any damages caused by the exercise of this permit.

4. The Permittee shall in no event cause to be impounded or diverted from the source of supply pursuant to this permit more water than is reasonably required for the purposes described herein. At all times when the water is not reasonably required for these purposes, the Permittee, pursuant to this permit, shall cause and otherwise allow the waters to remain in the source of supply.

5. The Permittee, shall take whatever steps are reasonably necessary to correct any adverse affects to the Objector's water supply shown to result from appropriation under this permit.

6. The Permittee shall diligently adhere to the terms and conditions of this permit. Failure to adhere to the terms and conditions may result in a revocation or modification of the permit.

VI MEMORANDUM

Although a relatively simple case factually, involving a minor excavation or deepening of a channel of a small stream and the creation of a stockwatering hole, or pond, the instant case presents complex doctrinal problems of water law. Among these is the issue of whether a private appropriator may appropriate water

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for a fish and wildlife use. Persuasive argument can be made against such an appropriation.

First is the difficulty in quantifying a maximum duty, or use. In contrast to irrigation or mining uses, for which an upper quantitative limit can objectively be determined, the more water, the better, for fish. That is, because beneficial use is the basis and limit of the amount of the right, the amount that can usefully be put to the appropriator's intended use is the limit of the right itself. Toohey v. Campbell, 24 Mont. 13(1900), Allen v. Petrick, 69 Mont. 373, 377-379 (1924).

Depending upon the intended use, the quantitative right, cannot exceed the maximum amount which can serve the intended purpose. For example, 70 ac-ft of water could not be beneficially used to irrigate 10 acres of barley. That amount of water would drown the crop. Twenty ac-ft of water could reasonably be applied to irrigate 10 acres of barley, however, so the second appropriation would be valid; the first only partially so; that amount in excess of the amount beneficially usable would not constitute a valid water right. Conrow v. Huffine, 48 Mont. 437(1914) Sayre v. Johnson, 33 Mont. 15, P. 389 (1905).

The amount of water which can beneficially be applied to fish however, has no upper limit. The economic allocation of the scarce water resource is frustrated because no "waste" could be shown to occur. That is, a junior appropriator could never show a senior's use (for fish and wildlife purposes) to be in excess

of what can be beneficially applied to his use, because the fish can always use as much water as is available, within the limits of the stream-channel.

Thus, where forced to make such determination as for example, because of various federal legislation, the minimum amount reasonably necessary has been used as the appropriate measure of the duty of the use:

> On the irrigation of crops there is an absolute upper limit to how much water can be applied; productivity drops or the crops may even drown if over-watered. Unlike irrigation, there is no apparent practical limit to the water that can be used for fishing and recreation; the more water there is, the more room there is for fish, boats and swimmers. The only physical limitation at the reservoir would be the capacity of the site. Since, however, water is such a scarce resource in this state and there are so many competing demands on the limited supply of water, each use can be assigned only the minimum reasonably required for that purpose United States v Alpine Land & Reservoir Co., 503 F.Supp.877,889. (D.C Nev 1980)

For wildlife use, the difficulty in ascertaining the duty, or maximum amount of water which can be beneficially used for the appropriative purpose, is similar. The limit is only that of the stream's maximum carrying capacity.

Second, application to the Water Use Act of the expressio unius est exclusio alterius[3] maxim of statutory construction leads to the conclusion that the reservation statutes are

[3] The expression of one thing is the exclusion of the other. That is, if a special statutory provision provides for instream fish and wildlife uses under different procedures than those for the private appropriation, it must be assumed that the special provisions are the only means available to obtain a water right for these uses.

intended to provide the sole means by which fish and wildlife appropriations can be made, those uses being designated as public uses, properly restricted to continuing control by representative public bodies, MCA §§ 85-2-316, 85-2-223 (1983). It would be anomalous, to allow a private appropriator, through the permitting process, to acquire an appropriation property right for fish or wildlife purposes, claiming the entire flow of a stream as the quantity of the right, while the reservation process restricts such rights, acquired only by public entities, to an amount a maximum of fifty percent of the average annual flow of record on gauged streams: (ungauged streams are allocable at the discretion of the board.) MCA § 85-2-316(5) (1983).

Further, while the State may not interfere with the private water right because the private appropriator would acquire a property right which, once perfected, is constitutionally protected from limitation or derogation, the board may eliminate any public entity's reservation and reallocate it to a different qualified reservant applicant when, after notice and hearing, it finds that "... all or a part of the reservation is not required for its purpose and that the need for the reallocation has been shown by the Applicant to outweigh the need shown by the original reservant." MCA § 85-2-316(10) (1983). To allow a private individual to acquire a protected property right, of significantly different characteristics than the public right in a reservation of water, is to allow haphazard development of the

state's water resource. The statutes cannot be interpreted in a way to defeat the express purposes of the Act[4].

The reservation statute clearly creates a public right, distinct from the type of property right acquired by a private appropriator, that certain waters are to be reserved from private appropriation (for diversion, impoundment, or withdrawal from a stream) through actions of public entities. The public bodies apply to the department for a specific reservation, and, after notice and hearing, the board may adopt an order reserving water, but only when the Applicant has established to its satisfaction; a) the purpose of the reservation b) the need for the reservation c) the amount of water necessary for the reservation and d) that the reservation is in the public interest. MCA § 85-2-316(3) (emphasis added). Unlike a private appropriation, these criteria must be established to the board's satisfaction. Further, the criteria for reservation of water are significantly different from those for private appropriation. See, MCA § 85-2-311.

The statutory law governing pre-1973 rights and the verification and final adjudication thereof also separately provide for public recreational uses.

[4] "It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utiliation, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystem. MCA § 85-2-101(3) (1983) (in part).

MCA § 85-2-223 provides:

> Public recreational uses. The Department of Fish, Wildlife, and Parks shall exclusively represent the public for purposes of establishing any prior and existing public recreational use in existing right determinations under this part, provided that the foregoing shall not exclude a federal governmental entity from representing the public for the purpose of establishing any prior and existing public recreational use in existing right determinations under this part. The foregoing shall not be construed in any manner as a legislative determination of whether or not a recreational use sought to be established prior to July 1, 1973, is or was a beneficial use.

While this statute, standing alone, does not compel the conclusion that private fish and wildlife appropriations cannot be acquired, when read in pari materia with the permitting statutes, it weighs toward such a conclusion.

Further evidence supporting the conclusion that fish and wildlife uses are not now, nor have ever been, considered beneficial uses for which a private appropriation may be had, is found in the preliminary decrees issued on October 21, 1983, by the Honorable Roy C. Rodeghiero, pursuant to Title 85, part 2, chapter 2 of the Water Use Act.

"The Court finds that instream wildlife use is not a beneficial use of water.

"Murphy Rights". Section 1 of Chapter 345 of the 1969 Session Laws provided for the appropriation of water in designated streams to maintain fish and wildlife habitat. The Court subjects these rights to all prior existing rights pursuant to 89-801 RCM 1947.

"The flow rate and volume of these rights are subject to change should the Court determine the waters are needed for a use determined to be more beneficial to the public" is the language reflecting this intent, as embodied in paragraphs 12-13 of the Preliminary Decree for the Belle Fourche River above the Cheyenne River, and, (with the inclusion of claims for fish and recreation) at paragraphs 12-13 of the Preliminary Decree issued for the Little Missouri below Little Beaver Creek.

Perhaps the strongest indicator that fish and wildlife uses might have been legislatively intended to be available for private appropriation is that such uses are included in the beneficial use definition at MCA § 85-2-102(2) (1983). However, the definition is also expressly general in its nature, providing that more specific statutory treatment supercedes where the context so requires. "Unless the context requires otherwise...(2). Beneficial use, unless otherwise provided." (emphasis added). This language comports with the well recognized rule of statutory construction that the specific statute will control over the general. MCA § 1-2-101(1983). Hence, the specific statutory provisions for reservations provide for the exclusive means by which instream fish and wildlife uses, inherently a category of recreation, are to be perfected.

Pre-1973 Montana Case Law

The Water Use Act did not change the nature of water rights as they existed in Montana prior to 1973, General Agriculture Corp. v. Moore, 166 Mont. 510(1975).

Pre-1973 case and statutory law must be analyzed to determine whether private fish and wildlife uses were then recognized in this State. If not, then clear legislative intent to create this category of private uses must be found in the Water Use Act in order to overcome the presumption that the Act intended more than establishment of statewide recordkeeping and permitting procedures to administer state water use rights. If, on the other hand, such private uses were legally cognizable prior to 1973, then clear legislative intent that no further appropriations would be allowed must be found to overcome the presumption that the Act intended to change the status quo.

Therefore we turn to Montana law prior to 1973 to search for recognition of private fish and wildlife uses as beneficial. Early appropriative law relied heavily on the requirement of a diversion of water and that water's subsequent application to a beneficial use. "When the right was fully perfected, that is, when there was a diversion of the water and its application to a beneficial use, it thereupon became a property right of which the owner could only be divested in some legal manner." Osnes Livestock Co. et al v Warren, 103 Mont. 284, 62 P.2d 206(1936), 294.

This diversion requirement made sense in the development of the priority system, largely serving as notice to other users of the same water source that another was diverting and laying claim to a usufructuary right in the source. Without some physical diversion works in the source, other users would have no notice

that another was making use of the source waters. Also, as a practical matter, the most common uses for water in the Western States which spawned the appropriation doctrine, ie: irrigation and mining, actually necessitated a physical diversion of water for its use. In Osnes, supra, there was a physical diversion of water which apparently "... was utilized to fill a depression, forming a lake or pond which was used as a swimming pool and perhaps to some extent for the propagation of fish." Osnes, at 301. On such uses the Court opined, "If we assume it to be the fact that the Hudson Brothers did nothing more with the water diverted than to use it for the purpose of maintaining a swimming pool or fish pond, it is not clear that such a use would not be a beneficial use and hence the basis of a valid appropriation. (Kinney on Irrigation, sec.697, Cascade Town Co. v Empire etc.Water Co., (C.C.) 181 Fed.1011)", Osnes,at 302.

This short implication, stated in the negative, and expressly inconclusive, is one of only three Montana cases broaching the subject. In Paradise Rainbow et al v Fish and Game Commission, 148 Mont. 412(1966) the court implicitly recognized a limited public right to a minimum instream flow sufficient to sustain game fish on certain streams in Montana. In Paradise Rainbow, an owner of a commercial trout hatchery sought mandamus against the Fish and Game Commission ordering its licensing of the fish ponds pursuant to Section 26-306, RCM 1947, which provided for Fish and Game Commission licensing of artificial lakes or ponds. Petitioner had several ponds, but the Commission categorized some

of them as being in natural streambeds and therefore not qualified for license under the statute. Because of the nature of the action, ie: one for extraordinary writ compelling performance of governmental ministerial duty, the case is saddled with much procedural discussion. Further complicating the matter is Fish and Game's action for injunction against Petitioner (DePuy) to construct a fish ladder over one of his dams and thereby release some of the water to which Depuy had appropriative claims. The Commission never disputed DePuy's valid appropriative right to the water behind the dam, nor even alleged that the amount of water actually put to beneficial use was less than the claimed right. Rather:

> The Commission does maintain that the public has a prior right in the waters of the creek which would require DePuy to release some water through a fish ladder. The public right urged by the Commission would be based on the fact that the public had used the creek as a fishing stream and natural fish hatchery before DuPuy built his dam. Under the rule of Bullerdick v Hermsmeyer, 32 Mont. 541,554, 81 P.334, DePuy could not use the water to the detriment of prior rights.
>
> Such a public right has never been declared in the case law of this state. California, an appropriation doctrine jurisdiction, whose constitutional provisions relating to water rights are virtually the same as Article III, § 15 of the Montana Constitution, has recognized such a right and has upheld statutes requiring fishways. People v Glenn - Colusa Irr. Dist., 127 Cal. App.30, 15 P.2d, 549. Under the proper circumstances we feel that such a public interest should be recognized. This issue will inevitably grow more pressing as increasing demands are made on our water resources and the abundance of good trout streams is unquestionably an asset of considerable value to the people of Montana. at 441, 820.

The Court then went on to deny that, on the facts before it, a public right existed in the stream. No public right, or no

public right senior to DePuy's right and as proffered by the Commission[5], was found because; a) the Commission had cooperated with DePuy, inspected the dam when built, but waited seven years to order him to build the fish ladder, b) the required showing being ... extraordinarily high sufficient to support the issuance of a mandatory injunction was not met and, perhaps most importantly, c) there was no showing of past sustained public use.

The Court gave no hint as to just how extensive public use need be for the public right to arise. It stated only that, "Armstrong Spring Creek is a short stream and is obviously not a major migratory route for a large numbers of fish." Id., at 420.

In the third case,, in Quigley et al. v McIntosh, 110 Mont. 495, 103 P.2d 1067, (1910) the Court upheld denial of water for diversion into a reservoir characterized as a fish pond, but not because the fish pond was not considered a beneficial use. The reason the order properly forbade the diversion for the fish ponds was because the pond had been recently constructed, and the water had been put to use after issuance of the decree adjudicating the rights in the source. Hence the new diversion into the pond was clearly a new appropriation from an adjudicated stream. "Since the record does not disclose a decree establishing such an appropriation, there [illegible]

[5] This public right was asserted as paramount over DePuy's right, and therefore demanding satisfaction by DePuy's construction of a fish ladder and release of his water.

diversion for that purpose, even if water had been shown to be available therefor, which is admittedly not the case here." Quigley, at 503.

This concern for the legal recognition of public rights, and the importance of public recreational rights to the healthy economy of Montana was echoed by noted scholar Albert W. Stone, (discussing acquisition of a water right by mere application to beneficial use, and arguing that such undocumented property rights should not be permitted in the future.) "A possible exception is the use of water by the public, What is everyones' business is no - ones' business and so uses by the general public are quite naturally unrecorded. But some of those uses are of great importance and should be recognized. The recreation industry in Montana is largely based upon the publics' beneficial use of water." Stone, Problems Arising Out of Montana's Law of Water Rights, 27 Mont. L.Rev. 1 (1966).

The Montana Water Use Act must be construed as recognizing a public right to maintain game/fish habitat in those streams deemed by public agencies to have sufficient characteristics of public use to justify reservation therefor. For these streams, the reservation system is the exclusive means by which an appropriation, or reservation, may be made for fish and wildlife purposes. These statutory provisions for reservation are sucessors to the Murphy rights which, also, were declined on

through State agency action[6]. Or streams where such public rights exist, private appropriators may not appropriate water for fish and wildlife uses. Whether instream private fish and wildlife appropriations may be made on streams where no public rights may reasonably arise, is not before us here.

Beneficial Use of Water

Applicant made several references to the use of the water for its scenic beauty. Looking at water, albeit beneficial to humankind, is not a use beneficial use within the meaning of the appropriative scheme. Sayre v Johnson, supra. Such a use simply is not encompassed by the appropriation doctrine.

No one seriously would argue his right to a priority date to enable him to prevent junior irrigation uses because he enjoyed looking at a quantity of water flowing through his property. Such a right amounts to a riparian right, ie: the right to continued reasonable flow of water. Rights to flowing water in streams on one's property, i.e., riparian rights do not exist

[6] The statutory predecessor of the reservation statute was the "Murphy Rights" statute; RCM 89-801 (1969). There, the analyses used in Paradise Rainbow, supra, were recognized, and, the certain public agencies were empowered to appropriate for instream uses, on certain enumerated streams in the state. Clearly, the legislature implicitly declared that these streams, and these streams only, were of such characteristics that a public right could be established thereon. That a public right, based in part upon historic public use, could arise and be protected from injury, was recognized in Paradise Rainbow, at 419, and then, those streams upon which those rights were recognized were set forth in the Murphy statute. Again, the replication is that only public entities may protect those rights, and that such rights arise only on certain, legislatively designated streams.

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within Montana[7]. Mettler v. Ames Realty, 61 Mont. 152, 201P. 702 (1921). Nor is scenic enjoyment of water listed among the statutory uses at MCA § 85-2-102(2).

Applicant did, however, list among the proposed uses for his project stockwatering for his two horses pastured on the land surrounding the pond. It is this use, and this use only, over which this department clearly has jurisdiction to issue a beneficial water use permit. Whatever additional uses the Applicant makes of the water may be beyond the jurisdiction of this agency to authorize, deny, or otherwise to regulate[8]. That stockwatering is a beneficial use properly within the appropriative system and for which the Department may issue a permit is beyond doubt. Instream private fish and wildlife uses do not exist in Montana, see above. Whether a private appropriator may, with a diversion, impoundment or withdrawal, appropriate water for a fish and wildlife use need not be decided herein because of the stockwater use for which the permit clearly [illegible] granted.

NOTICE

This proposal is a recommendation, not a final decision. Any party adversely affected may file exceptions to this proposal.

[7] With the irrelevant exception of the undetermined scope of federal riparian rights which exist pursuant to federal laws but within the boundaries of the State of Montana.

[8] Provided, of course, that these ancillary uses do not interfere with the reasonable use as a stockwater pond.

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Such exceptions must be filed (received) with the Hearing Examiner at 32 South Ewing, Helena, Montana 59620 within 20 days after service of this Proposal by first class mail, MCA § 2-4-623. All parties are urged carefully to review the terms of the proposed permit, especially checking the legal land descriptions, for correctness. No final decision shall be made until after the expiration of the period for filing exceptions, and the due consideration of those exceptions. All exceptions shall specifically set forth the precise portions of the proposed decision to which exception is taken, the reasons for the exception and authorities upon which the exception is relies.

DONE this 4th day of April, 1984.

Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

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AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 4, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Glenn and Lyla Lehrer, Application No. 35527-s41H, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Glenn & Lyla Lehrer, 8636 Panorama East, Bozeman, MT 59715
2. Leo & Audrey Westlake, 3820 McIlhattan Rd, Bozeman, MT 59715
3. H.A. Bolinger, P.O. Box 1047, Bozeman, MT 59715
4. Scott Compton, Water Rights Bureau Field Office (inter-departmental mail)
5. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 4th day of April, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Lobe

Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 1-31-85

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